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IN THE MATTER OF THE DISSEMINATION OF INDIVIDUAL CUSTOMER PROPRIETARY NETWORK INFORMATION BY TELECOMMUNICATIONS CARRIERS	))))))	**Docket No. RT-00000J-02-0066**

COMMENTS OF SPRINT COMMUNICTIONS COMPANY L.P. AND SPRINT SPECTRUM L.P.

I. Introduction

Sprint Communications Company L.P. and Sprint Spectrum L.P. dba Sprint ("Sprint") submit these comments in response to the Arizona Corporation Commission's ("Commission") proposed Customer Proprietary Network Information ("CPNI") rules. Sprint opposes the adoption of any of the three versions of CPNI rules circulated by the ACC Staff April 2, 2004. Like the Commission, Sprint understands and supports the Commission's desire to protect the privacy of customers. However, the Commission must recognize that its proposed rules do not exist in a vacuum. Section 222 of the 1996 Telecommunications Act ("the Act") established a national framework governing carrier use of CPNI, and the FCC has passed rules to implement the protections articulated in §222 of the Act (47 C.F.R. 64.2001 *et seq.*). As discussed below, subsequent binding

legal interpretation has concluded that certain First Amendment and FCC standards must be applied before any state-specific CPNI-related rules can be instituted.

All three versions of the Commission Staff's proposed rules represent an unfounded and unnecessary departure from the federal CPNI rules. As drafted, these three proposals all contain serious legal flaws, are unworkable, vague, and impossible to implement as an overlay to the FCC's rules. As a result, Staff's proposals will impose significant financial and operational hardships on both the telecommunications industry and Arizona consumers without any corresponding increase in privacy protection, while simultaneously delaying the service initiation process, impairing the development of new products and services, and deluging Arizona customers with repetitious and potentially confusing privacy information.

II. State-specific CPNI rules are unnecessary.

The Commission opened this docket in 2002 to investigate whether this Commission should undertake the promulgation of rules to protect Arizona consumers' CPNI.[1] Many telecommunications providers submitted comments to the Staff, which released its report and recommendation to the Commission on October 25, 2002. Staff recommended that the Commission proceed with this rulemaking despite the fact that such rules were universally opposed by the Arizona telecommunications industry, including Sprint, AT&T, Qwest, Citizens, MCI, Cox, Valley Telephone Cooperative, Inc., Copper Valley Telephone, and Valley Telecommunications, Inc.[2] At the time, only RUCO supported the idea of implementing rules, voicing concerns over "fundamental

[1] September 25, 2002 Procedural Order, Docket No. RT-00000J-02-0066.
[2] October 25, 2002 Staff Report and Recommendation, pp. 6-16. (Staff Report).

property and privacy interest[s]" in private information one must provide in order to subscribe to any telephone service.[3]

Despite having conducted discovery regarding the need for such rules, including the collection of data request responses from many telecommunications carriers, Staff cites no allegations of the improper use of information by any telecommunications provider. Staff's report also lacks any allegation that the FCC's CPNI rules are inadequate to protect Arizona consumer's privacy, or any instances of complaints that consumers have filed either with the Commission, the Attorney General, or the FCC. Thus, it is clear that the proposed rules have no foundation in fact, will not address an existing problem, and do not anticipate any apparent trend in the unauthorized use of the CPNI of Arizona customers.

Accordingly, for the reasons stated above and discussed in greater detail below, the currently-proposed CPNI rules (regardless of which version the Staff chooses to recommend for adoption by the Commission) will cause carriers to incur significant costs to develop changes to their billing and notification systems, and possibly reduce customer choice and increase prices, and are unnecessary. As a category of information, Sprint notes that CPNI is less sensitive than the data collected and used by companies in other industries such as banks, brokerage houses, and insurance companies. That the U.S. Congress has enabled banks and other financial institutions to use an opt-out method when dealing with very sensitive financial information demonstrates, by way of comparison, that the opt-out method by telecommunications carriers to deal with less sensitive is more than sufficient to protect the privacy rights of individuals with respect to

[3] Staff Report at 16.

their CPNI.[4] Additionally, other industries regulated by this Commission also collect and use their subscribers' information for marketing and other purposes without restrictions similar to those proposed in the currently proposed drafts. Therefore, Sprint suggests that the Commission rely on the FCC's rules going forward, or if further consideration is necessary undertake a renewed investigation into the need for such rules (this proceeding is now nearly two years old).

Sprint keeps its customers informed of their rights under the federal rules regarding CPNI through regular notices as well as in the "Welcome Packet" each Sprint customer receives upon subscribing to Sprint services. Additionally, Sprint has never received a complaint regarding its use of CPNI from any of its long distance, local or wireless customers at the FCC.

III. Opt-Out rules sufficiently protect the privacy interests of Arizona customers.

As an alternative to the currently proposed rules, an opt-out policy, as prescribed in the FCC's rules, sufficiently protects Arizona customers from the disclosure of sensitive personal information. Carriers are bound by Section 64.2007 of the FCC's rules, which contains customer notification requirements. These requirements, set forth in paragraph (f) of this rule, ensure that a carrier provides a customer with "sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose or permit access to, the customer's CPNI." Among other things, this rule requires carriers to advise the customer of the customer's right to limit access to CPNI and the precise steps the customer would need to take to limit such access.

[4] Gramm-Leach-Bliley Act (Financial Services Modernization Act of 1999).

Any person who believes that the sharing of his or her CPNI by his or her telecommunications provider for marketing purposes with the affiliates of such telecommunications provider would adversely affect his or her privacy may act to ensure that such information is not shared. A mandatory opt-in policy, on the other hand, would not result in additional benefits to consumers relative to an opt-out policy because, in many instances, it would block customers from receiving information about the products and services offered by their telecommunications provider that may be of interest to them.

IV. The proposed rules will cause significant harm to telecommunications carriers and Arizona consumers.

Requiring carriers to obtain opt-in approval to use customers' CPNI will dramatically impact Sprint's (and other carriers') operations by requiring extensive and costly system changes to accommodate the various ways to handle customer opt-in (or so-called opt-out with third party verification, which is in operation, oral opt-in), to generate and distribute additional written notices and process their return, as well as process written opt-in notices or verification systems. The compliance costs for updating systems and processes are estimated to be in the millions of dollars for Sprint alone. These costs are significant enough to cause Sprint to re-evaluate whether it would continue marketing new products and services to existing customers in Arizona at all, thereby depriving Arizona customers of the opportunity to learn about calling plans that may better suit their needs and calling patterns, and thereby save them money.[5] Because Arizona's proposed rules are squarely at odds with the Congressional and FCC goal of adopting a uniform national CPNI policy, carriers which operate on a regional or national

[5] Sprint's current estimates show that the minimum cost to implement the Staff's CPNI rules is $1.9M, with an ongoing expense of $2M annually.

basis will face further costs and operational challenges of either carving out a separate compliance system for Arizona or foregoing the benefits of the federal rules and tailoring their systems and operations to the most restrictive state CPNI regime.

Not only will these substantial costs fail to safeguard consumer privacy, as shown by the numerous flaws in the proposed rules, but they will be incurred in support of a system that actually frustrates consumer interests. In general, consumers are better off when businesses learn more about their customers in order to provide them products, such as long distance or wireless calling plans that suit their usage patterns. Consumer interest in obtaining such information is completely ignored by the proposed rules. Sprint submits that the question is not "at what price privacy?" Rather, it is whether these rules will appreciably protect Arizona consumers from bad actors or other risks to their privacy rights. Carriers have an interest in ensuring their customers stay satisfied with their services, and therefore dedicate significant resources towards meeting customer needs.

Consumer privacy preferences generally fall into at least three categories. Some consumers are "comfortable giving their information for almost any consumer value." Consumers at the other end of the spectrum reject all offers and benefits. Finally, a middle group of consumers "ask what's the benefit to them, what privacy risks arise, what protections are offered and do they trust the company . . ." The majority of U.S. consumers (58%) fall into this third category of privacy preferences.[6] This same study found that "the majority of consumers think it would be best if businesses put good privacy policies in place voluntarily, and saw their wide implementation." All three sets of consumers have their needs met through the current FCC opt-out rules. Use of CPNI

[6] Westin Testifies on Capital Hill, Privacy & American Business, June, 2001.

within an enterprise allows a carrier to target-market to those customers who, by their prior purchases, are more likely to be interested in a particular product or service. Without targeted solicitations, consumers would receive more unsolicited mail, e-mail, and telephone calls, because businesses could not market services and products only to those who are likely to be interested.

In addition to the consumer benefits, the FCC has also repeatedly found that the sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI used within a firm that already has the CPNI in order to receive increased competitive offerings.[7] These findings are supported by the industry's track record in this area. Under the FCC's "total services approach" rules established in 1998, carriers have been permitted to share customer data across affiliates without customer consent if customers already subscribe to services offered by the affiliate[8] and have done so for nearly four years with no record of abuse, customer harm, or customer dissatisfaction. These are the same affiliates which would share CPNI under an opt-out arrangement and which currently share the data under the opt-out approach.

The high cost of implementing processes to comply with state-specific CPNI rules will strain already thin margins among telecommunications providers. The bottom-line impacts of these increased costs translate into higher costs for Arizona consumers who will not be able to avail themselves of additional new products and services because the cost of compliance with the CPNI rules will largely preclude promotion of these products to existing customers. Additionally, to the extent the telecommunications carriers suffer

[7] FCC 1998 CPNI Order fn. 203
[8] *Id.*, ¶ 51.

a decrease in revenue as the result of their inability to implement measures to comply with the new rules and thus cease using CPNI altogether for their Arizona customer base, the state's tax coffers will also feel the financial pinch of reduced revenue opportunities for carriers in Arizona.

V. The proposed CPNI rules fail to comply with the law.

Regardless of how the state interest in protecting privacy is classified, the fact remains that the First Amendment requires the state to adopt the least onerous means for restricting speech in order to protect such interest. The 10th Circuit determined that an opt-out policy would comply with the free speech rights granted by the Constitution whereas the FCC's opt-in policy could not be justified under a First Amendment analysis even assuming that the state had a substantial interest in protecting privacy. As the Commission is aware, the use of CPNI is governed by Section 222 of the 1996 Telecommunications Act. In its first set of rules adopted pursuant to section 222, the FCC imposed an opt-in requirement, albeit one more moderate than that proposed by Rule 12. This requirement was invalidated by the Tenth Circuit Court of Appeal In *US West, Inc. v. FCC.*[9] The Court held that (1) CPNI constitutes "commercial speech" protected by the First Amendment, and (2) the FCC failed to demonstrate through "empirical analysis and justification" that its opt-in rule was narrowly tailored to directly and materially advance its interests in protecting privacy and promoting competition.[10] The court also held that the FCC failed to adequately consider the inherently less restrictive opt-out option, and that the FCC could not "rely on its common sense

[9] *US West, Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999), *cert. denied* 530 U.S. 1213 (2000).
[10] *Id.* at 1239.

judgment," but had to make a "careful calculation of the costs and benefits associated with the burden on speech imposed by its prohibitions."[11]

In response to the Tenth Circuit decision, the FCC conducted an exhaustive review of its CPNI rules and policies, receiving comment from every corner of the industry, including carriers, marketing experts, state and local regulators and consumer groups. Based upon this comprehensive nationwide evidentiary record, the FCC ultimately concluded that it could not, consistent with the First Amendment, adopt an opt-in regime for intra-company communications. As Chairman Powell explained, "despite the laudable efforts of the parties to generate an empirical record, not to mention our own efforts, no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court."[12]

In its new order, the FCC adopted an opt-out rule that, among other things, allows carriers intra-company use of CPNI to market communications-related services to their customers. The FCC also declined to preempt inconsistent state regulation of CPNI other than on a case-by-case basis, noting that states may impose more restrictive additional rules, but only after applying the same standard that the FCC used in its order.[13] Thus, any state rule that is inconsistent with the FCC's rules would be preempted unless the state has established the appropriate record and applied the FCC's standard.

The Commission has clearly not established such a record in this proceeding. Indeed, the Commission provided virtually no analysis in support of its rule, other than to explain that it believes the 10th Circuit's decision in *U.S. West v. FCC* does not restrict the ability of the Commission to implement CPNI rules more restrictive than those

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[11] *Id.* at 1238
[12] Third CPNI Order, Separate Statement of Chairman Michael Powell.
[13] *Id.*, para 71.

approved by the FCC because Staff's recommendations allegedly meet the requirements of the *Central Hudson*[14] analysis discussed in the opinion, and also because the Arizona Constitution contains a specific right of privacy.[15] Until such a record is established and the appropriate standard applied, any more restrictive rule would be subject to preemption.

Notwithstanding the lack of substantiation for the proposed rules as required by the 10th Circuit's *US West* decision, Sprint notes that the Federal District Court for the Western District of Washington has provided additional detail for the Commission's consideration as it determines whether to move forward with the proposed rules in its opinion in *Verizon Northwest, Inc. v. WUTC*,[16] which relied heavily on the reasoning of *U.S. West* to issue a preliminary injunction against the Washington Utilities and Transportation Commission ("WUTC") from enforcing its new customer proprietary network information rules. The Washington Court granted Verizon's motion for summary judgment and *permanently* enjoined the WUTC from enforcing its CPNI rules on the ground that they violate the First Amendment. The Washington court rejected the proposition that rules regulating carriers' use of CPNI do not implicate the First Amendment.[17] As the court explained, the Washington CPNI regulations "directly affect what can and cannot be said. Such a restriction, no matter how indirect, implicates the First Amendment."[18] Thus, although Staff claims that its rules can survive a *Central*

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[14] *Central Hudson Gas & Elec. Corp. v. Public Utilities Comm'n of N.Y.*, 477 U.S. 557 (1980).
[15] Staff Report at 21.
[16] *Verizon Northwest, Inc. v. Washington Utilities and Transportation Commission*, 282 F. Supp. 2d 1187 (W. Dist. WA) (Aug. 26, 2003).
[17] *Verizon Northwest*, at 1191.
[18] *Id.*

Hudson analysis,[19] the drafts' failure even to acknowledge that its rules restrict protected speech and thus implicate the First Amendment constitutes legal error.

Second, the Washington Court made clear that the Washington Commission was required not merely to consider the constitutional implications of its rules, but to prove that the rules could withstand First Amendment scrutiny.[20] Thus, even though the Washington Commission conducted a fairly lengthy analysis of its new rules under *Central Hudson*, that analysis failed to demonstrate the rules' constitutionality.[21] The Staff's draft rules fail to conduct this analysis, let alone demonstrate the rules' constitutionality.

Third, the Washington Court determined that, because the Washington rules would have conflicted with the FCC's rules regulating interstate services and were "dauntingly confusing and riddled with exceptions," they failed "to advance the state's interest in a direct and material way."[22] There is no question that Staff's proposed rules cannot be reconciled with the FCC's rules regulating interstate services. Thus, the proposed rules suffer from substantially the same deficiencies as did the Washington rules and would also fail the direct advancement prong of *Central Hudson*.

Finally, after reviewing the Washington Commission's substantial administrative record, rules and order, documents produced in discovery, deposition transcripts, and expert reports, the court determined that Washington failed to demonstrate that its rules

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[19] In *Central Hudson*, the U.S. Supreme Court established three criteria to govern state restrictions of commercial free speech: 1) The state must demonstrate that there is a substantial state interest in regulating the speech; and 2) that the regulation directly and materially advances that interest; and) that the regulation is not more extensive than necessary to serve the interest. (*Central Hudson*, at 564-65).

[20] *Verizon Northwest,* at 1194-95.

[21] *Verizon Northwest*, slip op. at 14 (holding that Washington's rules failed the narrowly tailored prong of *Central Hudson* even though "the WUTC explicitly considered and rejected an opt-out approach").

[22] *Id.* at 11-13.

were "'no more extensive than necessary to serve the stated interests.'"[23] The court expressly rejected Washington's attempt to justify an opt-in approach on the basis of "consumer complaints" lodged in connection with one carrier's defective opt-out campaign, and held that "opt-out notices, when coupled with a campaign to inform consumers of their rights, can ensure that consumers are able to properly express their privacy preferences."[24] In contrast, the draft rules are not supported by anything other than the apparent desire of the Commission to regulate this aspect of telecommunications business practices.

The proposed CPNI rules rest on a shaky legal foundation, and if adopted, will likely be overturned in federal court. The Commission should abandon its efforts to restrict the use of CPNI beyond what the FCC and the federal courts in the 10th Circuit and the Western District of Washington have prescribed, and rely on the FCC's rules which adequately protect the First Amendment rights of all parties involved.

VI. Comments regarding the proposed drafts.

The three drafts of CPNI rules proposed by the Staff all fail to adequately protect telecommunications carriers' free speech rights under the *Central Hudson*, *US West* and *Verizon Northwest* line of cases, and will impermissibly and unduly burden carriers' abilities to work with and offer their customers solutions to their telecommunications needs. In particular, the three proposed versions of the rules contain unworkable and confusing provisions.

TSA OPT-IN Version (Exhibit 1):

These proposed rules ignore much of the ruling of the *US West* case and current

[23] *Verizon Northwest*, at 1193(quoting *U.S. West*, 182 F.3d at 1238 (quoting *Coors Brewing*, 514 U.S. at 486)).

[24] *Id.*

FCC rules. Most obviously, these rules do not provide for opt-out approval at all, requiring opt-in approval to share CPNI even for a company's affiliates and joint venture partners. This restriction ignores the FCC's Total Services Approach, particularly with regard to carriers who have different affiliates offering different services. While Staff has articulated its belief that circumstances and legal authority allow it to impose more stringent rules than the FCC has passed, Staff has failed to narrowly tailor its rules to only affect the state interests in privacy it claims.

CALL DETAIL Version (Exhibit 2):

The Call Detail version of the proposed rules embodies the "dauntingly confusing" nature of the rules rejected by the federal district court for the Western District of Washington.[25] These rules create an unnecessarily complicated distinction of between Call Detail and CPNI and provides for different methods for gaining approval to use each of these categories of data, as well as the same redundant and unnecessary verification scheme discussed below. Further, the Call Detail version of these rules also ignores the admonishments of both the *US West* and *Verizon Northwest* Courts.

FCC Plus Verification (Exhibit 3):

The FCC Plus Verification version of the proposed rules, while technically less onerous than the other two versions, still fails to comport with federal free speech protections as discussed in *US West* and *Verizon Northwest*. Additionally, the requirement that carriers verify a customer's opt-out approval obviates any benefit of using the opt-out approval because of the customer confusion generated by duplicative verification schemes.

In addition, all three versions of the rules contain the requirement to verify a customers' "opt-in approval" or "opt-out approval" (depending on the version of the

[25] *Verizon Northwest* at 1193.

rules).[26] This verification requirement is unnecessary whether a customer has actively opted-in or passively opted-out because in both cases, the customer has been notified of the carriers' use of CPNI for marketing purposes, and verification increases a carrier's costs and bothers the customer with redundant and annoying contacts. Under Staff's proposed rules opt-in approval requires that a customer affirmatively choose to allow a carrier to use his or her CPNI for marketing purposes and is, in reality, an oral opt-in requirement. Following up this decision with an inquiry as to whether the customer meant what he or she said when authorizing the carrier to use CPNI will lead to significant customer confusion. Additionally, where a carrier can proceed with opt-out approval, verifying a carriers' choice not to notify the carrier of his or her decision to allow use of CPNI clearly eliminates the benefit to the customer of not having to deal with giving his or her opt-in approval. Assuming Sprint customers read the Welcome Package they receive, the verification of the customers' election is again needlessly repetitive and confusing for customers.

In addition to the onerous verification requirements, the requirement to submit regular notices to customers either in monthly bills or through separate quarterly mailings is expensive for and confusing for customers. Also, the requirement for confirming the change in a customer's CPNI approval is vague and cannot be complied with.

VII. Conclusion

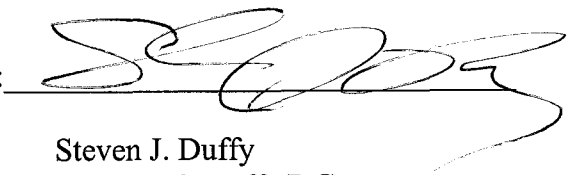
For the reasons stated above, the Commission should re-evaluate its decision to move forward with the drafting of rules governing carriers' use of customers CPNI that differ from the FCC's rules. The current drafts all fail to meet the minimum constitutional standards for restricting commercial free speech as discussed in *US West* and *Verizon Northwest*, fails to provide real consumer benefit, and should be abandoned. To the extent the Commission deems Arizona-specific CPNI rules necessary, the

[26] *See*, Exhibits 1-3 to Staff's Notice of Proposed First Draft, April 2, 2004 at R14-2-xx06 (Call Detail and FCC Plus) and at R14-2-xx05 (TSA Opt-In).

Commission should model any rules on the FCC's rules or adopt them by reference.

Dated this 17th day of May 2004

Respectfully submitted,
SPRINT COMMUNICATIONS COMPANY L.P.
AND SPRINT SPECTRUM L.P.

By: 

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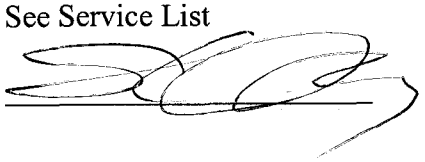

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